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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 6-8) is reported at 87 F. Supp. 94. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27-35) is reported at 183 F. 2d 825.

JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1950 (R. 36). Petition for certiorari was filed July 18, 1950, and was granted October 9, 1950 (R. 39). The jurisdiction of this Court rests upon 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether under the Federal Tort Claims Act the United States may be joined as a third-party defendant upon a claim for contribution as if it were a private individual under like circumstances.

STATUTE AND RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 14 (a), on third-party practice, and of the Federal Tort Claims Act,[1] are set forth in the Appendix of this brief, *infra*, pp. 28, 25-27.

STATEMENT

On June 9, 1949, Kenneth Neil Stradley filed a comp' int seeking from petitioner, Capital Transit Company, $50,000 damages for personal injuries allegedly sustained August

[1] The accident out of which this litigation arose occurred before the effective date (September 1, 1948, See Section 38 of the Act of June 25, 1948, 62 STAT. 992) of the new Judicial Code. The provisions of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 STAT. 842, formerly codified as 28 U. S. C. § 931 *et seq.* are by the revision now distributed through various sections of the new code. The revision has been considered by the Revisers (H. R. REP. No. 308, 80th Cong., 1st Sess., p. A123) as constituting "change * * * in phraseology." The Government deems the two versions to have "immaterial" differences (Petition for certiorari, footnotes 1, 6, pp. 3, 7, *United States* v. *Yellow Cab Co.*, No. 218 this Term.) This Court has likewise considered the codification changes to be immaterial, see footnote 5, *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 370 (1949). Since most decisions discuss the Act by its original section numbers rather than by reference to Judicial Code sections, the same course will be followed herein.

4, 1947, as the result of a collision between petitioner's streetcar, upon which Stradley was a passenger, and a Government vehicle from Ft. Meyer, Virginia (R. 1-2). Petitioner obtained leave of the District Court to make the United States a third-party defendant upon the claim that the collision was at least partially due to the negligence of a soldier in the course of his employment in operating the Government-owned vehicle, and judgment over was sought against the United States for a contributable portion of any judgment awarded Stradley against petitioner (R. 4, 3-4). The United States moved to have the third-party complaint dismissed for failure to state a cause of action (R. 5). The District Court, being of the opinion that a claim for contribution was not within the Federal Tort Claims Act waiver of immunity (R. 6-8), granted the motion (R. 8-9) and rendered final judgment dismissing the third-party complaint (R. 9-10).

The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal upon the ground that, irrespective of whether a claim for contribution was within the scope of the Federal Tort Claims Act, such an action could not be asserted in a third-party complaint (R. 27-35).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a contribution claim against the United States cannot be entertained through the third-party complaint procedure.

2. In failing to hold that the Federal Tort Claims Act permits a claim for contribution which is maintainable against the United States through the same third-party procedure available against a private individual under like circumstances.

3. In affirming the order of the District Court.

SUMMARY OF ARGUMENT

In the District of Columbia the amenability of a private person to a suit for contribution asserted in the third-party complaint of a concurrent tortfeasor is well-settled.

In unambiguous language, Congress in the Federal Tort Claims Act has directed that on any claim against the United States on account of personal injury caused by negligence of a Government employee while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant under the law of the place where the negligence occurred, the United States shall be liable "*to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances*", except as to interest before judgment and punitive damages.

The Act specifically states that the Federal Rules of Civil Procedure are to govern the practice and procedure in actions thereunder. Those rules, while specifying in many particulars special treatment for the United States, do not except it from the third-party practice provided for in Rule 14.

Twelve exceptions enumerated by the Act from its coverage demonstrated the congressional desire that no thirteenth exception should be created by judicial construction. None of the twelve exceptions restricts from the wide scope of "any claim" on account of personal injury either a claim for contribution or the claims of subrogees or indemnitees.

The legislative history of the Act, shown in years of congressional consideration, establishes that Congress in passing the Act was seeking to increase its own efficiency and at the same time eliminate injustice to claimants by replacing the out-moded and monarchic system of private claim bills with a broad system of recovery as a matter of legal right rather than as a dispensation from considerations of sovereign grace. Both the letter and spirit of the Act demonstrate the intention that the Government was to

be put in the same position as any private party, and that the cases involving joint tortfeasors were to be determined by local law.

Strained analogies to statutes with a less liberal background and decisions applying thereto a doctrine of strict construction are contrary to the congressional attitude in passing the Tort Claims Act. Arguments premised upon a congressional intent to give a special and limited waiver of immunity are out of keeping with this statute's plainly expressed purpose to treat the Government like an individual unless otherwise stated. That Congress was aware that such a private party status would include contribution claims is clear from the long-standing practice in admiralty where joinder of the United States with a private defendant, as well as contribution, is a common occurrence. Fancied difficulties on the trial of trying a case as to one defendant to the jury and to the judge as to the United States have not impressed experienced trial judges. Such conjectural considerations under-estimate the power and ability of federal district judges to see that substantial justice is done in the district courts.

The opinions below mark a retrogressive step toward the inaccurate and unhappy concept that "the King can do no wrong", serve to defeat in an important respect the direction of the Federal Tort Claims Act that the United States, with certain enumerated exceptions, shall be treated as "a private individual under like circumstances", and are markedly contrary to the attitude of this Court which, in considering the Federal Tort Claims Act, has stated that since hardship enough is involved in the exemption of the sovereign from suit, "We are not to add to its rigor by refinement of construction where consent has been announced." *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383 (1949).

ARGUMENT

1. The Federal Tort Claims Act Without Ambiguity Directs That the United States Is to Be Liable on Any Claim On Account of Personal Injuries, With Specified Exceptions, in the Same Manner and to the Same Extent as a Private Individual Similarly Circumstanced.

In the District of Columbia it is clear that one of two joint or concurrent tortfeasors can, through Rule 14 (a) of the Federal Rules of Civil Procedure, recover contribution from the other tortfeasor involved in a two-vehicle collision which injures a plaintiff. Such a party-alignment is said to be an apt illustration of the "proper application of the third-party practice provided by that Rule." *Knell* v. *Feltman*, 85 U. S. App. D. C. 22, 24, 174 F. 2d 662, 664 (1949). Therefore, the inquiry is whether the United States, for the personal injury to Stradley, is to bear its fair share of any liability as would a similarly situated private employer.

a. Waiver of immunity by the United States of special treatment upon claims on account of personal injury caused by the negligence of Government employees plainly appears in the Federal Tort Claims Act.

Because of the traditional immunity of the sovereign from suit, statutory basis must be shown for an action for contribution. The Federal Tort Claims Act is the waiver statute in this instance. Section 410 (a), the heart of the Act, establishes the waiver by providing in pertinent part that the United States district court shall have jurisdiction:

> "* * * to hear, determine, and render judgment on *any claim* against the United States, * * * on account of * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *, under circumstances where the United States, *if a private person*, would be liable to the claimant for such * * * injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title,

> the United States shall be liable in respect of such claims to the *same* claimants, in the *same* manner, and to the *same* extent *as a private individual under like circumstances*, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the *same* extent as if the United States were a *private litigant*, except that such costs shall not include attorneys' fees." (Emphasis supplied.)

No plainer expression in common English usage could be conceived than "the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances" to convey the meaning that the Government was thenceforth to be on a precise parity with the private employer. No longer was the morally unjustifiable claim of "sovereign immunity" to offend the conscience of the Government. It would seem that such unequivocal language would have placed beyond cavil the equality of Government and governed insofar as responsibility for negligence of their employees was concerned.

That no special status under the Federal Tort Claims Act as to contribution claims or third-party practice was reserved to the United States is apparent both from the failure to mention them in the Act and from the express enumeration of the particulars in which there was to be special treatment: *e.g.*, the negligence has to be "within the scope" of employment (thus excluding mere automobile-ownership liability); the court is to sit "without a jury" as to the United States; interest prior to judgment, punitive damages and attorneys' fees as part of costs are not to be allowed against the Government. Obviously, any other normal incidents of such litigation applicable to private persons would fall within the direction for liability "in the same manner, and to the same extent" as a private individual under like circumstances.

b. THE FEDERAL RULES, INCLUDING THIRD-PARTY PROCEDURE, WERE EXPRESSLY MADE APPLICABLE TO TORT CLAIMS ACT ACTIONS.

Leaving nothing to construction, the Act provided in Section 411:

> "In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505)."

Here is express reference to the Federal Rules of Civil Procedure for the applicable practice and procedure, and to the Tucker Act as to counterclaim, set-off and interest and payment of judgments. In numerous instances, the Federal Rules specify special treatment of the United States, *e.g.*, Rules 4 (d) (Service of summons), 12 (a) (Time for answer), 13 (d) (Non-enlargement of counterclaim limits), 25 (d) (Time for substitution of parties), 37 (f) (Expenses for failure to make discovery), 39 (c) (Use of advisory jury with consent), 45 (c) (Non-tender of witness fees), 54 (d) (Costs against unsuccessful party), 55 (e) (Judgment by default only upon evidence to court), 62 (e) (Security upon stay of judgment), and 65 (c) (Security on temporary injunction). Rule 14 (a) provides no such special treatment for the United States as to third-party practice. There is no sound analogy to the Tucker Act under which individual defendants cannot be joined since the Tort Claims Act refers to the Tucker Act only in specified particulars, whereas the Federal Rules are to govern the general practice and procedure under the Act.

Interpreting the language of the Tort Claims Act as if it limited the district courts' jurisdiction to actions where the United States and only one other party appear in the same court room, ignores the congressional direction that the

United States is to be liable "in the same manner" as a private individual and that the "practice and procedure shall be in accordance" with the Federal Rules of Civil Procedure. The Government position in the case at bar stems from an insistence that it be treated in a favored manner contrary to the congressional direction that with stated exceptions the United States is to be "liable * * * in the same manner * * * as a private individual."

This Court has recognized in *United States* v. *Aetna Surety Co.*, 338 U. S. 366 (1949), that the claims of subrogees, not expressly mentioned in the Act, are within the district court jurisdiction. No logical reason appears why Congress in the increase of its efficiency would wish to relieve itself of the burden of direct and derivative claim bills and yet to remain the sole recourse on a claim for contribution from a joint tortfeasor with the Government. In the Tort Claims Act the Congress did not express any such illogical distinction as to the meaning of the "any claim" jurisdiction conferred upon the district courts. Indeed, the Executive Department of the Government, soon after enactment of the Statute, indicated that the scope of the Act was not then considered by it to be restricted to suits against the United States alone, when it resisted efforts of a private defendant to be freed from a joint action. See *Englehardt* v. *United States*, 69 F. Supp. 451, 454 (D. Md. 1947).

c. THE EXCEPTIONS ENUMERATED FROM THE COVERAGE OF THE ACT SHOW THAT NO FURTHER EXCEPTIONS WERE TO BE IMPLIED.

Conclusions compelled by the language of both the jurisdictional and procedural sections of the Act are that contribution is allowable since a private person would be liable therefor (Sec. 410 (a)), and that third-party practice is the proper mechanical means of enforcing the liability since the Federal Rules of Civil Procedure are to govern (Sec. 411). These conclusions receive additional confirmation from consideration of Sec. 421, the "exceptions" portion of the

statute, which in subsections (a) through (l) delineates with particularity the twelve situations in which the otherwise all-inclusive "any claim" jurisdiction is not to apply.

Excepted by Section 421 is any claim:

(a) "based upon" a discretionary function; "arising out of" (b) transmission of postal matter, (c) administration of the Trading with the Enemy Act, (h) enumerated actions including certain intentional wrongs, defamation and interference with contract rights, (j) combatant activities of the armed forces in time of war; "arising in respect of" (c) the assessment or collection of taxes or the detention of goods; (d) for which a remedy against the United States is provided by the Suits in Admiralty or the Public Vessels Act; "for damages caused by" (f) a United States quarantine, or (i) fiscal operations of the Treasury; "arising from" (g) injuries while passing through canal zone waters or (l) the activities of the Tennessee Valley Authority; or "arising in" (k) a foreign country.

Analysis of the types of exceptions from the "any claim" coverage is revealing in that it shows the variety and care with which the exceptions were spelled out. Particularly informative on the questions of both contribution and third-party practice, is exception (d) as to admiralty and maritime torts for the stated reason that a remedy as to them already was available against the United States. The Suits in Admiralty Act of March 9, 1920, 41 *Stat.* 525, 46 U. S. C. § 741 *et seq.* (1940) permits actions against the United States where if such vessel or cargo "were privately owned" (§ 742) a proceeding in admiralty could be maintained, such suits to be heard and determined according to the principles of law and to the rules of practice obtaining "*in like cases between private parties*" (§ 743). Of the two statutes the Federal Tort Claims Act has been said to have "the more far reaching language." *Hill* v. *United States*, 74 F. Supp. 129, 132 (N. D. Tex. 1947); *accord*, *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 657 (9th Cir. 1948).

The United States, though not mentioned by name in the Rule, certainly can be impleaded on a claim for contribution under Admiralty Rule 56. Joint suit against the United States is said to have become "almost common practice." *Englehardt* v. *United States*, 69 F. Supp. 451, 453 (D. Md. 1947). An example of impleader of the United States is to be found in *The Cotati*, 2 F. 2d 394 (S. D. N. Y. 1923) and of a joint action in *Olavarria & Co.* v. *United States et al.*, 56 F. Supp. 758 (S. D. Ala. 1944). In rejecting the narrow construction of the Tort Claims Act urged by the Government with respect to derivative claimants in *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 856 (S. D. N. Y. 1948), Judge Medina likened the Suits in Admiralty Act and the Federal Tort Claims Act as both fitting into the historical background of the waiver of sovereign immunity in such fashion as to indicate a satisfaction on the part of Congress with the formula "where the United States, if a private person, would be liable." And although the Court of Appeals for the Third Circuit thought emphasis properly was laid on the admiralty practice permitting joinder, *Howey* v. *Yellow Cab Co.* v. *United States*, (R. 22), the Court of Appeals for the District of Columbia Circuit opinion fails to consider the parallel.

This Court has looked to the exceptions contained in Section 421 as leading to the conclusion that further exceptions were not to be judicially created. Thus, it was said in *Brooks* v. *United States*, 337 U. S. 49, 51 (1949):

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. § 421. None exclude petitioners' claims."

The gravamen of the Government argument with respect to both the allowance of contribution and its maintenance through the expeditious third-party procedure seems

to be that the Tort Claims Act did not contain in the jurisdictional and liability section (410) the statement that "any claim for contribution" shall be included, nor in the procedural section (411) that "the Federal Rules of Civil Procedure, but not Rule 14 (a), shall apply. The draftsman's task would be well-nigh interminable if inclusive terms such as "any claims", "in the same manner", and "to the same extent as a private individual" are not to be given their plain everyday meanings. There would seem to be no more reason for making specific reference to joint or concurrent tortfeasors than to derivative claimants, nor to third-party defendant and joint defendant practice than to joint plaintiff procedure. Certain special treatment of the United States was set out in the Act. Surely, Congress should be privileged to use inclusive language to cover the remaining situations. With respect to derivative claimants the Government made similar efforts to cut down the area of Tort Claims Act operation. Its contentions were rejected by seven of the eight Courts of Appeals which considered them, one of which stated in *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 657 (9th Cir. 1948):

> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."

The lower courts' reluctance to give effect to the Tort Claims Act's general waiver of immunity is clearly shown both in the District Court's frank characterization of its dismissal of the third-party complaint as an application of the rule of strict construction (R. 7), and in the appellate court's affirmance—despite the latter's lip-service to the "broad construction of the Act" laid down by this Court (R. 35). To be contrasted with these examples of restrictive construction is the view of this Court expressed

through the Chief Justice in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383 (1949):

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

2. The Legislative History of the Tort Claims Act Indicates an Intention to Leave the Matter of Contribution to Local Law.

As Mr. Justice Reed stated in *United States* v. *Spekar*, 338 U. S. 217, 219 (1949):

> "The Federal Tort Claims Act of 1946 was the product of some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment."

It would therefore seem that the statute should mean to the courts what the Act's language reasonably conveys to those who are expected to be guided by it. If, as we have urged, the words of the statute are enough, there is no need to seek further confirmation by searching the legislative history to ascertain what may have been in the minds but not put into the words of the men behind the statute, or behind the bills which were not enacted into law. It is at least dubious whether the legislative history sheds light or shadow. The District of Columbia Circuit from a consideration of the legislative history of the Act thought that (R. 34):

> "Congress did not intend the United States to be joined as a third-party defendant."

The Third Circuit, on the other hand, from such a study thought (R. 21):

> "... it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder * * *."[2]

Nevertheless, the more modern history of the efforts to remove the much-criticized exemption of the sovereign from answerability for the negligence of its servants, does indicate that in the culminating "Act to provide for increased efficiency in the legislative branch of the Government", the Congress decided to leave the rights and liabilities of the United States in cases involving joint tortfeasors to be determined by the local law.

Passing over the earlier interesting but unavailing efforts to secure passage of an equitable application of tort liability to the United States, an examination of legislative history may begin profitably with the 76th Congress. The Federal Tort Claims Act was part of the Legislative Reorganization Act of August 2, 1946, c. 753, Title IV of PUB. LAW 601, 79th Cong., 2d Sess., 60 STAT. 842, and evolved from successive closely related drafts from S. 2690, 76th Cong., 1st Sess., Section 306 of which provided:

> "SEC. 306. If the damage, loss, injury, or death is caused under circumstances creating a legal liability on the part of some person other than an officer, agent, or employee of the Government or upon some corporation, State, or political subdivision, to pay damages therefor, jointly with the United States, then, and in that event, the recovery against the United States shall be only for the pro rata share of the damages in proportion to the number of parties, so jointly or severally liable."

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[2] See also the student Recent Decisions Comment upon the district court ruling in the instant case: "a decision which disregards the local law on the right of contribution and interprets strictly the words of the Act seemingly vitiates its whole purpose." 35 VA. L. REV. 925, 927 (1949).

Judge Holtzoff, then with the Department of Justice, in explaining this provision in *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690,* 76th Cong., 3rd Sess. 40 (1940) stated that:

> "Section 306 is a provision regarding which a question or two was asked during the last hearing. It relates to a situation in which the Government is a joint tort feasor with someone else. Suppose, for example, there were two joint tort feasors and the Government is one of them. We might envisage a case in which one joint tort feasor is insolvent and financially irresponsible. On the other hand, however, where there are two joint tort feasors, either one should not logically be liable for more than one-half, even though under our law recovery can be had for the whole amount against either. In many States, as you will recall, they are getting away from the old rule of no contribution among joint tort feasors. In many States they are allowing contribution to a certain extent. This provision approaches the problem from a somewhat different angle, but tries to arrive at the same result."

Identical to Section 306 of S. 2690 was the same section in H.R. 7236, 76th Cong., 1st Sess., of which H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5, stated:

> "Section 306 deals with cases in which the Government is one of two or more joint tort-feasors. In such cases the Government is to be liable only for its pro rata share of the damages. Cases in which the other joint tort-feasor is an officer, employee or agent of the Government are excepted."

The language of former bills relating to the multiple liability situation was slightly altered in H.R. 6463, 77th Cong., 2d Sess., in which Section 403 read:

> "Sec. 403. If the damage, loss, injury, or death *with respect to which a claim is made pursuant to this Act* is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or *severally* with the United States, the award or judg-

> ment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." (Emphasis supplied.)

The foregoing revision would seem to include a claim for contribution within its provisions as to being "severally" liable with the United States, irrespective of whether the plaintiff chose to name both the other person and the United States in the plaintiff's original complaint. Assistant Attorney General Shea, explaining the bill on behalf of the Department of Justice, said of the section in *Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 34 (1942):

> "* * * I have come to Section 403. It provides for proportionate liability of the United States, based upon the number of parties liable, where the damage has been caused jointly by a Federal employee and someone else. That is, if the tortious injury is committed by the Federal employee and two others, the United States will only be liable for one-third."

In reporting out the bill, then known as S. 2221, the House Committee on the Judiciary explained in H.R. REP. No. 2245, 77th Cong., 2d Sess. 12 (1942):

> "Section 403 of the Senate bill provided for proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill and *in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law.*" (Emphasis added.)[3]

Thus, Congress indicated as plainly as words could convey that contribution between tortfeasors was to be left for determination according to local law. Although other later bills contained sections similar to the earlier provisions

[3] This House Committee Report likewise stated that "no person may be joined with the United States as a defendant." The procedural point is treated *infra*, pp. 17-22.

(S. 1114, 78th Cong., 1st Sess., Sec. 403 (1943)) the foregoing expression of the purpose to leave the matter of contribution to be decided by local law was never thereafter modified or rejected. Furthermore, H.R. 181, 79th Cong., 1st Sess. (1945), as well as the bill which became law, S. 2177, 79th Cong., 2d Sess. (1946), followed the example of the House Committee on the Judiciary in making no further mention of proportionate liability, thus leaving such cases to local law.

3. Liberal Multi-Party Procedure Under the Tort Claims Act Should Not Be Defeated by Strained Analogy to Tucker Act Procedure.

The answer to the prime question of the allowance of contribution *vel non* under the Federal Tort Claims Act, where allowable under local law, being in the affirmative, the secondary question of its manner of assertion in a third party complaint or by separate action becomes of importance.[4] The Court of Appeals *held* in the instant case that the third-party complaint was not the appropriate procedure (R. 35). In so doing it was strongly influenced (R. 32) by an asserted parallel to the Court of Claims Tucker Act joinder prohibition as set forth in *United States* v. *Sherwood*, 312 U.S. 584 (1941), extended by the court below to the Federal Tort Claims Act in *Sappington* v. *Barrett and United States*, 182 F. 2d 102, 103 (D.C. Cir. 1950).[5]

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[4] The Court of Appeals below declined to pass herein upon the substantive question of whether contribution is recoverable at all from the United States. The district court's dismissal upon the broader question expressly was affirmed upon the procedural point only (R. 35). Mr. Justice Frankfurter in *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 396 (1939) was of the opinion that "a steadily growing policy of governmental liability" should not be "contingent upon irrelevant procedural factors."

[5] The *Sherwood* and *Sappington* cases involved *joinder* of defendants, whereas the instant case involves a single *third-party* defendant. In the only reported district court *third-party* case located,

The short answer to the analogy urged is that a third-party complaint for contribution against the United States *alone* does not involve a question of joinder at all. No one is called upon to answer a claim for contribution except the United States until some third-party plaintiff brings in both the United States and one or more *additional* third-party defendants upon a contribution claim. Accordingly, even if Congress could be said not to have intended *joinder* of the United States on a claim for contribution, the supposed case is not this one.

Moreover, it is submitted that even as to joinder the Tucker Act of 1887 and decisions thereunder should not be extended to the more liberal statutory waiver contained in the Tort Claims Act of 1946. In the *Sherwood* opinion on the Tucker Act, the Court plainly stated, *supra*, at 590:

> "The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."

That the Court considers this rule of strict construction to be inappropriate to the Federal Tort Claims Act is clear from the Court's opinion in *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949):

> "* * * The Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

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the United States was successfully kept in by a private defendant as a third-party defendant upon a claim for indemnity (which, also equitable in origin, is contribution with a vengeance). *Newsum* v. *Pennsylvania R. R.* v. *Williams and United States*, 79 F. Supp. 225 (S. D. N. Y. 1948).

In relying for its holding upon the Tucker Act and the associated *Sherwood* decision, the Court of Appeals below (R. 30) emphasized the following language from a report on H.R. 181, 79th Cong., 1st Sess., a predecessor of the bill which the 79th Congress, 2d Session, enacted into law:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (Act of March 3, 1887, 24 Stat. 505; 28 U.S.C. sec. 41 (20). The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States* v. *Sherwood*, 312 U.S. 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C.A.A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891). The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H.R. REP. 1287, 79th Cong., 1st Sess., p. 5)

Similar language as to non-joinder is likewise to be found in the report on another earlier bill. Thus, in H. R. REP. No. 2245, 77th Cong., 2d Sess., the view is expressed, at 12, that "no person may be joined with the United States as a defendant", and, at 9, "The bill therefore does not permit any person to be joined as a defendant with the United States * * * ." These earlier opinions as to non-joinder were not carried forward into the report on S. 2177, the bill enacted into law. The latter report made no reference to joinder or to the *Sherwood* and kindred cases and contented itself with stating that "The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, * * *" and pointing out that "the practice and procedure shall be in accordance with the Rules of Civil Procedure * * *." SEN. REP. No. 1400, 79th Cong., 2d Sess. 32 (1946).

The Court of Appeals for the Third Circuit thought that the omission from SEN. REP. 1400 of any reference to joinder gave plausibility to the contention that the earlier intention expressed by the members of the House Judiciary Committee was not insisted upon (R. 20). And as Judge Hulen, Judge of the United States District Court in the Eastern District of Missouri, said in an address on the Tort Claims Act, reported at 7 F. R. D. 689, 699, 700 (1948):

> "* * * the inclusion of a section specifically making the Federal Rules of Civil Procedure applicable to proceedings under the Act would seem to counterbalance what was said before the Judiciary Committee * * *."
>
> "Local law will determine as between the Government and a joint tort-feasor, issues of pro rata liability and rights of contribution."[6]

The Court of Claims was established to pass upon claims against the United States, not against individuals. The 1887 Tucker Act gave the district courts jurisdiction *concurrent* with the Court of Claims to hear such claims involving up to $10,000. Thus, Congress could hardly have intended in 1887 that Tucker Act cases could be otherwise than against the Government *alone*. Tucker Act jurisdiction had become so firmly crystallized that application to such cases of the Federal Rules of Civil Procedure (which became effective in 1938) failed to persuade this Court that individual defendants were thereafter to be within the long-established Tucker Act jurisdiction. In the 1946 Federal Tort Claims Act, on the other hand, Con-

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[6] This was likewise the opinion on joinder of an attorney in the Torts Section Claims Division, Department of Justice. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1, 27, 34 (1946). As a corollary, the same author considered that the United States, assuming propriety of joinder, has "no basis to contest a co-defendant's right to contribution against it * * *." Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 FED. B. J. 391, 407 (1948).

gress was specific that the Federal Rules *should govern* the "practice and procedure" thereunder. Thus, there was a very different historical framework between the Tucker and Tort Claims Acts. See Chesnut, J., in *Englehardt* v. *United States*, 69 F. Supp. 451, 453, 454 (D. Md. 1947).

It is true, as the Court of Appeals opinion below points out (R. 32), that provision was made for appeal to the Court of Claims in Tort Act cases *provided all the parties to the appeal consent*. From this, the Court of Appeals reasoned that it was unlikely Congress intended the Court of Claims to determine judicial controversies between private litigants which would be something quite different from its normal function (R. 33). However, it is submitted that the conclusion drawn by the court from the very limited appellate jurisdiction given the Court of Claims is the converse of the conclusion which should have been drawn. The appellate jurisdiction in the Court of Claims is so limited, (and so unlikely to be utilized due to geography, if for no other reason), that the proper conclusion should be that as to tort claims it was to have a purely supporting role—certainly not that the trial court jurisdiction was to be ascertained by a consideration of what type of litigant normally appeared as defendant in the Court of Claims. The giving of this limited appellate jurisdiction to the Court if Claims seems to have stemmed from a desire that it not be left "altogether from the picture" rather than a desire to give it a significant part in the handling of the new type of cases. This was made clear by Assistant Attorney General Shea, as the Department of Justice Representative, in *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. 17, 18 (1942):

> "Mr. McLaughlin. Mr. Chairman, may I ask a question? I notice in title III that the Court of Claims is clothed with appellate authority. How did you arrive at that determination? That provision will clothe the Court of Claims with an absolutely new authority, will

it not? The Court of Claims today has no appellate jurisdiction, as I understand it.

• • •

Mr. SHEA • • • The reason for appellate jurisdiction in the Court of Claims is this: In the prior bill the Court of Claims had concurrent jurisdiction with the district courts.

Mr. CELLER. You mean the district courts exercising original jurisdiction?

Mr. SHEA. That is right.

Mr. CELLER. That is a district court without a jury?

Mr. SHEA. That is right.

And it appeared to us that the court was not well geared to handle the trial of these cases as a nisi prius court. The trial of cases in the Court of Claims is befor commissioners.

The district court judges have experience in the trial of tort cases. They know the State law and they have been sitting on this kind of case, which the Court of Claims has not been. So it appeared to us that the nisi prius jurisdiction should be exclusively in the district courts.

• • •

"• • • It seemed to us, on the other hand, in view of the fact that Congress has relied largely on the Court of Claims as the tribunal handling claims against the United States—that has been the most significant court in the claims picture—that it was probably not desirable to exclude it altogether from the picture, and if it was not going to have nisi prius jurisdiction, then it ought to act in the appellate stages."

And in this connection it is significant that Section 412 (a) of the Federal Tort Claims Act provided for review in the Court of Claims "*provided*" the notice of appeal carried written consent "on behalf of all the appellees." Plural parties defendant certainly seem to have been contemplated by the use of "all the appellees" since Congress is not likely to have expected the Government to be the appellant or losing side in every case.

The concern expressed by the Court of Appeals below (R. 33) over possible trial problems arising from a jury trial as to an individual defendant, and a non-jury trial as to the United States, was not deemed of serious consequence by the Third Circuit (R. 18), nor by so experienced a trial judge as Judge Chesnut. *Englehardt* v. *United States*. 69 F. Supp. 451, 454 (D. Md. 1947). Judge Goldsborough occupied the dual role in the unreported case of *Theodore Brown* v. *Capital Transit Co.* v. *United States*, Civil No. 387-47, D. D. C. Jan. 26, 1949. The wide discretion possessed by federal district courts as to remittiturs, new trials and directed verdicts should be sufficient to enable them to avoid the potential difficulties which have been urged as indicative of a congressional intent to allow neither contribution claims, nor third-party complaints, nor joint suits. The trend of modern procedure being to secure in one litigation expeditious handling of disputes among all the affected parties, a very clear expression of intent should be required before reversal of this customary practice in private litigation. Rule 20 (b) gives the district court authority to order separate trials and enter other orders to prevent delay or prejudice from joinder of parties, and Rule 42 (b) gives similar power as to separate trials of any "claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party, claims, or issues".[7] Chief Judge Laws took advantage of the flexibility inherent in the Federal Rules where an asserted misjoinder was urged by directing under Rule 21 that the jury trial as to the individual defendant be held first, to be followed immediately before the same judge as to the tort claim against the United States. *Ezzell* v. *United States and Independent Taxi Owners Ass'n.*, Civil No. 3888-47, D.D.C. Oct. 18, 1949. Such intelligent use of the federal trial

[7] Form of trial under the Federal Rules is determined not for the action as a single unit but as to each issue. FED. R. CIV. PROC., 38, 39.

court's powers should cause most of the Government's hypothetical procedural objections to disappear. Should any difficulties remain, legislative action would seem to be the proper remedy, since it was the Congress which directed that the United States, both substantively and procedurally, was to be liable "in the same manner" as a private individual.

CONCLUSION.

The Federal Tort Claims Act marks a conspicuous achievement in renunciation of the monarchial concept that "The King can do no wrong." The decisions of the District Court and the Court of Appeals in the case at bar are contrary to the modern climate of public and judicial opinion which has become increasingly inhospitable to claims of governmental immunity. The purpose of Congress in passing the Tort Claims Act was to rid itself of the burden of considering private claim bills by placing the United States on the same plane as a private employer.

It is indisputable that a private individual, postured as is the Government in this case, would be answerable to petitioner on its third-party complaint for contribution. Since frustration of legislative intent is to be avoided whenever possible, the issue in this case is simple: Is the United States, or is it not, to be liable "to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances" as Congress has directed in the Federal Tort Claims Act? If so, the court below should be reversed.

Respectfully submitted,

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November, 1950.

APPENDIX

Statutes and Rules Involved

1. Sections 410(a), 411, and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 STAT. 842, now, with immaterial amendments in the new Judicial Code, provide:

> Sec. 410 (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorney's fees.
>
> Sec. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall

be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

Section 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assesssment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The new *Judicial Code,* Title 28, *United States Code,* as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. and amended by the Act of May 24, 1949, Public Law 72, 81st Cong., 1st Sess. provides:

28 U. S. C. 1346 *United States as defendant.*

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and thet District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or ross of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employement, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. § 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

• • • • •

28 U. S. C. § 2680 lists the same exceptions, with slight citation changes to conform to the new Judicial Code, as were listed, *supra,* in the original Act.

3. Pertinent among the Federals Rules of Civil Procedure is Rule 14(a) which provides in part:

> Rule 14: Third-Party Practice.
>
> (a) *When Defendant May Bring in Third Party.* Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendants may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
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> * * * * *